CONFIDENTIAL ATTORNEY-CLIENT COMMUNICATION
(Submitted Electronically)

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Air Enforcement Division
United State Environmental Protection Agency

RE: Draft standard audit program agreement for the New Owner Clean Air Act Audit Program for oil and natural gas exploration and production facilities

Dear Ms. Chapman, Mr. Sullivan, and Mr. Williams:

The California Air Resources Board (CARB) submits this comment letter, including the attached technical comments, to the United States Environmental Protection Agency (U.S. EPA) on the draft standard audit program agreement for the proposed New Owner Clean Air Act Audit Program (Draft Agreement).[1]

Upon a new acquisition of oil and natural gas exploration and production facilities, the Draft Agreement would require the acquiring company to self-audit its newly acquired facilities to ensure compliance with the Clean Air Act and relevant State Implementation Plan requirements.[2] In return for this self-audit and the timely correction of any discovered violations, U.S. EPA would promise that the Draft Agreement would be the "complete resolution of all civil claims and causes of action alleged or which could have been alleged under the Clean Air Act, its implementing regulations, and the federally-approved and -enforceable requirements of applicable State Implementation Plans

[1] Draft Oil and Natural Gas Exploration and Production Facilities New Owner Audit Program Agreement, https://www.epa.gov/sites/production/files/2018-05/documents/oil_and_gas_new_owner_program_audit_agreement_may_4_2018_draft.pdf; *see also* U.S. EPA, New Owner Clean Air Act Audit Program for Oil and Natural Gas Exploration and Production Facilities, https://www.epa.gov/enforcement/new-owner-clean-air-act-audit-program-oil-and-natural-gas-exploration-and-production.
[2] Draft Agreement ¶ 3.

(SIPs) for all of the disclosed and connected Violations in [COMPANY'S] Final Report provided to EPA."[3]

The Draft Agreement oversteps U.S. EPA's authority, by attempting to contract away liabilities for which U.S. EPA does not have the power to waive. U.S. EPA may not waive California's authority to enforce relevant provisions of the Clean Air Act or relevant requirements of California's State Implementation Plan under the Clean Air Act. U.S. EPA also does not have authority to waive the citizen suit provisions of the Clean Air Act. CARB requests that the Draft Agreement clearly state that it does not resolve any claims or causes of action that may be brought by the States or private citizens under the Clean Air Act or State Implementation Plans with regard to disclosed, corrected, or undisclosed violations.

In addition, the Draft Agreement would benefit from use of an independent third-party verifier instead of relying solely on an acquiring company's self-audit. U.S. EPA is neglecting its duties under the Clean Air Act by allowing a self-interested party to audit itself and thereby avoid serious penalties for violations under the Clean Air Act. Further, U.S. EPA relies on the new purchaser to conduct the audit, even though that new purchaser may not be sufficiently familiar with the facility and operations to definitely determine whether violations have occurred.

The most basic responsibility of U.S. EPA is to protect the public. This Draft Agreement does not further that fundamental duty. U.S. EPA's resources are better spent increasing the stringency and enforcement of existing environmental protections.

Please feel free to contact me at (916) 322-7077 or richard.corey@arb.ca.gov to discuss any of these issues. Thank you for your consideration.

Sincerely,

Richard W. Corey
Executive Officer
California Air Resources Board

[3] Draft Agreement ¶ 14.

Comments of the California Air Resources Board

Under U.S. EPA's proposal, a company that acquires oil and natural gas exploration and production facilities may enter into a New Owner Audit Program Agreement (Draft Agreement) under which the acquiring company would "conduct a self-audit of its newly acquired Facilities for compliance with the Clean Air Act (Act), its implementing regulations, and federally-approved and enforceable requirements of applicable State Implementation Plans (SIPs)."[4] In return for this self-audit, under paragraph 14 of the Draft Agreement, U.S EPA would consider violations disclosed and timely fixed to be completely resolved by the agreement:

> This Agreement and an appropriate final EPA determination (Final Determination) in this matter—e.g., a Notice of Determination—issued after [COMPANY'S] completion of the Audit Program consistent with this Agreement shall be the complete resolution of all civil claims and causes of action alleged or which could have been alleged under the Clean Air Act (Act), its implementing regulations, and the federally-approved and - enforceable requirements of applicable State Implementation Plans (SIPs) for all of the disclosed and corrected Violations in [COMPANY'S] Final Report provided to EPA.[5]

To avoid any confusion or misunderstanding, paragraph 14 should explicitly state that it does not waive the States' right to bring an enforcement action for disclosed violations, nor does it waive a person's right to bring a citizen suit under section 304 of the Clean Air Act.

In addition, U.S. EPA should not rely solely on a self-interested acquiring company's self-audit, but instead require an independent third-party auditor to conduct an audit prior to any agreement.

I. U.S. EPA does not have authority to waive California's enforcement discretion under the Clean Air Act through an audit agreement with a polluter

With only limited exceptions, California retains authority under Clean Air Act section 116 to enforce "(1) any standard or limitation respecting emissions of air pollutants or (2) any

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[4] Draft Oil and Natural Gas Exploration and Production Facilities New Owner Audit Program Agreement ¶ 3, https://www.epa.gov/sites/production/files/2018-05/documents/oil_and_gas_new_owner_program_audit_agreement_may_4_2018_draft.pdf

[5] Draft Agreement ¶ 14.

requirement respecting control or abatement of air pollution."[6] The Clean Air Act structure also relies on State enforcement authority, for example, by requiring that a state implementation plan submitted by a State "shall . . . include enforceable emission limitations and other control measures" and "include a program to provide for the enforcement of the measures described."[7]

Paragraph 14 of the Draft Agreement is arguably ambiguous about whether U.S. EPA is attempting to foreclose State enforcement of disclosed violations with its language that the agreement "shall be the complete resolution of all civil claims and causes of action alleged or which could have been alleged under the Clean Air Act [or state implementation plans]."

U.S. EPA does not have authority under the Clean Air Act to resolve, through this type of agreement with a violator, claims or causes of action that may be brought by California under the Clean Air Act or under its state implementation plan. California is not a party to this Draft Agreement and therefore cannot consent to waive its right to bring such enforcement actions under the Draft Agreement.

For these reasons, CARB is concerned that paragraph 14 of the Draft Agreement is misleading at best, and to the extent it attempts to waive the right of California to bring an enforcement action, is unenforceable. As a result, it could mislead acquiring companies who sign the agreement under mistaken assumptions about the liability waiver and lead to unnecessary and costly litigation. U.S. EPA should revise paragraph 14 to make it clear that it is not attempting to waive the right of States to bring enforcement actions for violations uncovered through the audit program.

II. U.S. EPA does not have authority to waive citizen suits that may be brought under Clean Air Act through an audit agreement with a polluter

As U.S. EPA is well aware, under section 304 of the Clean Air Act, any person may commence a civil action against any person alleged to have violated an emission standard or limitation or order issued by U.S. EPA or a State regarding such a standard or limitation.[8] Section 304 also allows a person to commence a civil action when the alleged violation has been repeated.[9]

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[6] 42 U.S.C. § 7416. California also retains authority, discussed in Part II, to bring citizen suits under section 304 of the Clean Air Act.
[7] 42 U.S.C. § 7410(a)(2).
[8] 42 U.S.C. § 7604(a).
[9] 42 U.S.C. § 7604(a).

Section 304 prohibits such a citizen suit if "the Administrator or State has commenced and is diligently prosecuting a civil action in a court of the United States or a State to require compliance with the standard, limitation, or order."[10] An agreement by U.S. EPA not to bring suit for discovered violations under the Draft Agreement does not equate to "diligently prosecuting a civil action in a court" and therefore does not operate as a barrier to citizen suits under the Clean Air Act. Nothing in the Clean Air Act suggests that U.S. EPA otherwise has authority to waive a person's ability to bring a citizen suit in this manner.

In addition, the right to bring a citizen suit is held by the person, not U.S. EPA. Because the person is not a party to the Draft Agreement, that right cannot be waived under the Agreement.[11]

CARB is therefore concerned that paragraph 14 of the Draft Agreement is misleading at best, and to the extent it attempts to waive the right of a person to bring a citizen suit, is unenforceable. Again, it could mislead acquiring companies who sign the agreement under mistaken assumptions about the liability waiver and lead to unnecessary and costly litigation. U.S. EPA should revise paragraph 14 to make it clear that it is not attempting to waive the right of persons to bring citizen suits for violations uncovered through the audit program.

CARB is also concerned that paragraph 14 of the Draft Agreement could be used by an acquiring company as a defense to a later citizen suit that alleges repeated violations—if some of those violations were uncovered by the audit program contemplated by the Draft Agreement. U.S. EPA should clarify in the Draft Agreement that discovered violations may be used as evidence of repeated violations in any future citizen suit. This would also have the benefit of encouraging the acquiring company to avoid future violations of the same type.

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[10] 42 U.S.C. § 7604(b)(1)(B).

[11] *See, e.g.*, *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 ("[A] cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause."); *Bueno v. City of Donna*, 714 F.2d 484 (5th Cir. 1983) ("The standard for measuring an effective waiver of a constitutional right requires that the waiver be an 'intentional relinquishment or abandonment of a known right or privilege.'").

III. U.S. EPA should require a third-party independent auditor in lieu of a self-audit before waiving U.S. EPA's right to bring enforcement actions for violations under the Clean Air Act

The Draft Agreement sets forth a procedure by which the acquiring company "shall conduct an Audit of its Facilities' compliance with agreed upon provisions of the Clean Air Act."[12] Under Appendix C, the acquiring company develops "the [COMPANY]-tailored Audit protocols and Audit checklists (Audit Instruments) for the Audits."[13] In other words, the acquiring company will not only be conducting the audits but also setting the terms under which the audit is conducted. This gives too much discretion to a company that has a strong interest in not uncovering problems with its newly acquired facility.

The most basic responsibility of U.S. EPA is to protect the public, not the regulated industry. U.S. EPA is not meeting its duties under the Clean Air Act by, instead of bringing enforcement actions, letting companies audit themselves using audit rules created by those same companies. Further, U.S. EPA is relying on the acquirer to conduct the audit, even though that new purchaser may not be sufficiently familiar with the facility and operations to definitely determine whether violations have occurred.

U.S. EPA has also not adequately considered or prevented a scenario by which a company sells a problematic facility asset to a shell company, in order to take advantage of this lenient audit program for new purchasers by disclosing past violations that remain a liability in the absence of this type of waiver agreement.

To ensure an effective auditing program, U.S. EPA should instead require the use of an independent third-party auditor. For example, California has a successful third-party verification program under its Mandatory Reporting Regulation to ensure that industry accurately reports its greenhouse gas emissions. U.S. EPA should require a similar level of verification under its Draft Agreement before agreeing to waive violations of the Clean Air Act.[14]

IV. Conclusion

U.S. EPA should make it clear in the Draft Agreement that the waiver in paragraph 14 applies only to U.S. EPA actions, and not actions brought by States or under the citizen

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[12] Draft Agreement ¶ 5.
[13] Draft Agreement appx. C, ¶ 1.
[14] Cal. Air Res. Bd., Mandatory GHG Reporting—Verification, https://ww2.arb.ca.gov/verification.

suit provision of the Clean Air Act. U.S. EPA should also require use of an independent third-party auditor in the Draft Agreement.